BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 21999

OREN BELL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

v.

OREN BELL,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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January, 1968.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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JURISDICTIONAL STATEMENT

This is an action in tort filed against the United States of America under the provisions of 28 U.S.C. Sections 1346(b), 2671 et seq. The District Court for the District of Alaska had jurisdiction of this cause by reason of 28 U.S.C. §1346(b). On January 10, 1967, the District Court for the District of Alaska filed its Memorandum re motion for judgment in favor of defendant United States pursuant to Rule 52(a), Federal Rules of Civil Procedure. On March 24, 1967, the Clerk entered judgment

pursuant to the Court's Findings of Fact and Conclusions of Law and Rule 58, Federal Rules of Civil Procedure.

On April 17, 1967, appellant filed his Notice of Appeal and Bond on Appeal pursuant to Rule 73, Federal Rules of Civil Procedure. Pursuant to Rule 73(g) application was made to this Court for extension of time in which to docket and file the record on appeal. On May 19, 1967, this Court ordered that appellant's time for docketing and filing of record on appeal be extended to and including July 3, 1967. This Court had jurisdiction of this appeal by reason of 28 U.S.C. §1291.

SPECIFICATION OF ERROR

That the Court erred in finding

"9. Plaintiff, from the injuries suffered by him as a proximate result of defendant's negligence, has sustained, with reasonable certainty, the following damages which has been reasonably assessed and computed by the court and are set forth below:"

"b. The sum of $25,000.00 for past and future pain and suffering."

"d. The sum of $25,000.00 to compensate plaintiff for the effect of the condition resulting from plaintiff's injuries on his personality, coordination, ability to remember and his disposition."

"e. The sum of $69,000.00 for impairment and diminution of plaintiff's ability to work and earn money."

upon the grounds that the same are contrary to the uncontradicted evidence in this case.

STATEMENT OF FACT

On the fifth day of January, 1964, Mr. William Burgess was, at approximately 11 o'clock in the morning, operating a

five-ton tractor-trailer approximately 30 feet in length on the Seward Highway south of Anchorage, Alaska (TR 41). At an intersection known as 38th Street, this vehicle turned left (TR 46). At the same time the plaintiff, coming in an opposite direction, attempted to turn right to avoid the tractor's left turn (TR 47). Approximately 17 feet west of the intersection a collision occurred.

The plaintiff was rendered unconscious and was hospitalized at Providence Hospital (TR 418).

Plaintiff sustained a contusion of the left chest, ruptured left diaphragm, ruptured spleen, herniation of the stomach and left transverse colon into the chest cavity and a severe cerebral injury (TR 418). The left lung was partially collapsed because of blood collecting in the chest (TR 419). The spleen was removed (TR 420). The plaintiff was unconscious and remained so thirteen or fourteen days (TR 422). He then began to respond to his name (TR 424). In about sixteen days he was able to comprehend simple commands and be up and walking (TR 424). He suffered other injuries which have since healed and are not the subject of this appeal. He did, however, suffer injury to the uretha which will require dilations for the rest of the young man's life (TR 425).

Dr. Allan Parker, clinical psychologist (TR 435), evaluated the plaintiff's intellectual functions, memory function, and perceptual functions in that it reflected loss relevant to organic brain damage and emotion functioning (TR 437). He found intellectual functioning of the plaintiff to be above average, with variable eye-hand coordination. Intellectually his reasoning remained intact (TR 438). He was deficient in mental control under time pressure and he was deficient in the area of visual reproduction. There was no evidence of brain damage in his perceptual processes and his designs were basically intact (TR 439).

In emotion functioning, however, he was shown to have a tendency toward impulsivity, explosiveness and odd thought processes or ideation.

On a second examination it would be fair to say that he improved some. In most fields (TR 440), however, his personality structure and his character were about the same as in the first with the degree moderated (TR 441). The doctor concluded that the emotion difficulties and emotion controls were permanent and that there would be permanent residual and that there is some possibility that there might be increasing moderation with doubtful full recovery (TR 449).

The doctor concluded after cross examination as follows:

"Q. Would this degree be reflected actually in his actual ability to hold and retain employment and deal with other human beings?

A. I previously testified that since employment is connected with interpersonal relationships, these tendencies might make difficulties for him in employment.

Q. Would that actual degree be reflected in his history of having been able to deal with persons in the community? [emphasis ours]

A. I believe it would. Normally we consider that history is an important part of such evaluation." (TR 470)

Dr. Ray Langdon, psychiatrist, examined the patient to ascertain his general demeanor, behavior, attitudes, speech, and to obtain an impression of general emotion responses (TR 472). When first seen, he was bordering on the delusional, was not clearly confused or disoriented but his emotional reaction was hostile and anxious. The doctor was never able to establish a therapeutic relationship with Mr. Bell (TR 475) but based upon the hospital record and the affidavits submitted to him, concluded that the probability was that his controls have been

diminished and that the accident was an important major factor in his condition (TR 477). He likewise concluded (TR 478) that assuming the statements of employers relative to forgetfulness, inability to do mechanical tasks safely, such as jacking a car, in absence of such a history prior to the accident, was related to this trauma (TR 478). Dr. Langdon further testified that destruction of brain cells had to be assumed in this case though not cells of the cerebral cortex (TR 478). The doctor testified that his condition was permanent (TR 480).

Dr. Perry Mead, neurosurgeon, was accepted as an eminently qualified, Board certified, neurosurgeon. He testified that there was no evidence of scalp injury or injury to the skull (TR 495). He identified the injury producing the unconscious state and decerebrate state as being due to the violence of the collision. This witness testified that it was impossible to determine the exact nature of the cerebral injury since the injury here probably concerned the brain stem, one of the mechanisms responsible for the control of behavior, emotion, and consciousness (TR 497). The doctor testified as follows:

"Q. Now, Doctor, just for the purpose of clarifying the testimony you have given, I would like to hand you a rubber model brain and ask you to just show the court what you mean by brain stem and where the hemorrhages are presumed to have occurred and in what centers, and particularly what centers or systems with which you are familiar that control the behavior and control mechanisms of an individual are located in the brain stem, if I am clear on that question.

A. Yes sir. The primary difficulty in a decerebrate comatose individual is in the upper brain stem - I don't have a cross section here - but it would be in the region of the brain stem at this point (indicating), this whole area being brain stem (indicating). Some of the lower brain stem is actually missing on this model. But in the upper

region which is just above the crossing of the major motor pathways where they go from one hemisphere down into the brain stem and cross over and descend into the spinal cord, at this crossing point or just above it is where the influence of the fiber pathways from the surface of the brain have been interfered with, so they develop the comatose state along with the posturing of extermities that are very stiff. The individual straightens out and just stimulating him will make him arch his back and stiffen further.

At this point there are many relay centers to the cerebellar hemispheres which control coordination or prevent tremor, for example, and balance, plus many relays to the surface of the brain and the hemispheres which have to do with a person's emotional responses to their environment, primarily the degree of wakefulness, arousability, alertness and so forth. It's all located in the area just at the point where we have the lesion or injury that produces this comatose state or decerebrate rigidity. It's a diffuse cellular area that runs even further up higher into the brain where correlative pathways to other sections of the brain exist and these include pathways that go up into the brain and also that come from the surface of the brain downward which have to do with a person's response to external stimuli and wakefulness, their emotional responses to their environment, their ability to handle sudden changes in their environment, their ability to handle sudden changes in their environment along with their ability to correlate plans of action, mainly in response to fright or emergency situations.

So I can't show you exactly due to a lack of cross-sections, but it is in the upper brain stem where this condition is known to occur, and the small vessels that go out in there. There is a liklihood that hemorrhages existed due to swelling of the brain and excess pooling of blood in the vessels so the blood eventually gets out into the brain substance and the blood out of the vessels in the brain acts as a foreign body or irritant, and a small hemorrhage in this area is all it needs to produce coma maybe even of a permanent

nature. Fortunately in this individual we know he responded after a time indicating the hemorrhage was not of great severity and at least he did not have any permanent brain damage to the brain stem to the degree of keeping him in a comatose state indefinitely.

Q. Doctor, will you identify, because it will assist us later in argument, the names of the particular systems that you have identified.

A. The diffuse anatomic description of the area involved in the brain stem is called the reticular formation, and there are certain portions of this that have to deal with arousability, wakefulness, correlative pathways to other portions of the brain or higher centers, also relay stations to the nerves that go downward or through the spinal cord, and also a certain amount of control of the nerves that go down into the trunk. In this particular individual the 10th cranial nerve or vagus nerve would be the one possibly influenced by the hemorrhage or abnormalities that occurred in the region of the reticular formation.

Q. What effect would interference with the vagus nerve have?

A. Initially it might allow for stasis or stagnation of bowel function, upper bowel primarily, stomach, to a certain degree the amount of widening or dilation of the bronchi in the lungs, and at a later time excessive impulses over the same nerve would cause stomach ulcers or too much acidity.

MR. VAN HOOMISSEN: We object to the stomach ulcers, Your Honor, on the same basis we have before.

THE COURT: I will sustain the objection.

BY MR. PARRISH:

Q. When you said severe injury to the brain or brain stem was your definition of this in relation to an internal condition?

A. The injury where decerebrate posturing has occurred in marked depth of coma is a last stage toward what we call failure of the brain stem or modullary failure where respiratory activity would cease and then the blood pressure would go up and eventually the patient would die without aid of artificial respiration, and even those given artificial respiration with brain stem failure would not survive more than two or three days in my experience."

The patient was seen to suffer double vision (TR 503), blacking out sensations (TR 503), impairment of judgment of actions with his head turned (TR 504), weakness of the muscle groups of the left hand due to ulnar paralysis.

The doctor performed a transposition of the ulnar nerve which primarily functions to coordinate fine movements, and found weakness of the left hand to be a permanent condition and that the plaintiff-appellant would not be able to operate at peak efficiency with the left hand as with the right hand due to fatigue, cramps, and discomfort with prolonged use (TR 510).

This physician observed the plaintiff over a period of two years. He described him as having a puzzled attitude, seeking repeated explanations, being argumentative, failing to remember each discussion, being worried about his hand, and seeking re-assurance. The physician felt that his headaches affected his behavior and attitude and that he would become frustrated and irritated (TR 512-514). Several medications were attempted for the headaches. None was successful except Mepergan, a narcotic. This narcotic enabled the plaintiff to sleep. He received only a trial of this narcotic, the chief importance being that it indicated to the physician that the headaches were of an organic nature since they were not helped by other ordinary drugs The physician likewise attempted to control the headaches on an anti-convulsant basis using small doses. It was not advisable

to continue with this course of treatment too maximum efficiency assuming the headaches to be on an epileptic basis since the drug in this case affected the plaintiff's arousal centers preventing normal activity (TR 515-518). Difficulty with treatment was encountered since it was impossible to prevent the headaches without inducing a condition where the patient slept all day.

In 1965 additional drugs and muscle relaxing agencies were used (TR 578). This course of treatment posed better results than others since it was small amounts for the headaches and assisted the plaintiff to remain alert (TR 519), however, his behavior was erratic. He showed up at the office at odd times and did not show up for his appointments.

By April of 1965 he indicated vague paralysis in one arm or one leg varying from side to side. The paralysis was regarded as subjective but was relieved by Edrisal. This being the case, the doctor concluded that there must be dysfunction in the reticular formation previously described (TR 519). The physician noted that, by the last of August, 1965, headaches were persisting, the medication kept the patient going and stimulated him into action, however, tension phenomena and anxiety symptoms were noted (TR 520).

An additional drug, Desoxyn, was undertaken, however, the patient remained depressed although more ambitious. By September 1965 he was again placed on Edrisal (TR 521). By the end of 1965 the patient appeared to be having lots of conflict. There was evidence of difficulty with his attorney; difficulty with his employers and attempting to being employed. Medication was again changed. His headaches were not improved and his initiative and response were not improved so he was returned to Desoxyn. His despondency seemed helped. He appeared to be doing better but by this time he commenced to develop symptoms of

stomach burning (TR 522). Up to the time of trial, he used Edrisal sporadically. Again his ability to reason seems to be affected. The physician testifies that he believes the drug Edrisal helps the plaintiff however as soon as he feels good, he ceases its use.

Dr. Mead then testified as follows: "These headaches are associated with the injury." (TR 524). "They are disabling." (TR 525) "They are permanent." (TR 525).

Assuming that the patient exhibited depression, anxiety, forgetfulness, argumentativeness and frustration, the physician testified that these conditions were related to the injury. The doctor then testified that these problems were related to brain stem injury (TR 527), that they affected his capacity to earn a living, that they are permanent and that these opinions were consistent with his actual observation and treatment of this patient.

The doctor further testified that these conditions could become worse affecting further stomach problems and further emotional difficulties due to continued cellular change, that seizures could develop in the future (TR 530). The doctor further testified that memory difficulties shown by the evidence could relate to the injury and would be permanent (TR 531). Likewise that such memory difficulties would affect the capacity of the plaintiff to earn a living. The doctor likewise believes that the plaintiff should not continue to drive due to his inability to respond to sudden decisions.

An examination of the neuro-surgeon by the Court elicited the following:

> "Q. Doctor, I am wondering now, as a result of your examinations and study of this patient what opinion do you have with reasonable certainty as to what effect these residuals will have on this capacity to earn in the future?

A. It seems to be, as I have observed in this individual, an impeding factor regarding his keeping employment of the type he would ordinarily be expected to perform, and this has been manifested by the various layoffs he has had from different jobs because of poor performance, and some difficulty perhaps in his interpersonal relationships with employers, and lack of them being able necessarily to depend on him. Otherwise, as I have mentioned earlier his employability would be limited to that of tasks that he could perform and still have almost constant supervision. I can't conceive of many jobs available to him that would be of that type, and there again he still has a certain amount of intelligence existing in spite of the injury so he might become frustrated and perform poorly in a job that was very menial, for example, and thereby make it difficult for him to continue with simple tasks.

Q. In the evidence here by way of oral testimony and affidavits there is testimony to the fact that while in high school he was a photographer for the school paper and yearbook, and took and developed all the pictures and apparently was very proficient in photography. Now was there anything that would interfere with his continuing in that field of endeavor?

A. It's conceivable that he might have some problems, not so much in the manual requirements, for example, but in the planning and coordinating and if he was working on a commercial basis some difficulties with his employer, or even customers if he tried to be self-employed. He wouldn't be able to perform in certain categories like industrial photography where he might be required to ascend certain heights.

Q. Are you saying that this man is because of his condition no longer employable in any field of endeavor?

A. It seems like there should be some field of endeavor for him. I am unable to state just what at the present time. But he has had a trial for a number of jobs since this happened. He's got problems apparently in getting along with other individuals. If

he could get in his own business, for example, or set his own hours and work at his own pace where he would not be frustrated or lead to problems with other people, it's conceivable he could do even photography.

Q. As I understand from Dr. Parker, the psychologist, and perhaps from Dr. Langdon, at least from Dr. Parker, he has an intelligence range in the bright-normal range?

A. Yes sir.

Q. But apparently in this emotional and behavioral field he is abnormal. Now why is that, assuming that an average intelligent person, a normal person, we all realize we can't argue with everyone, we have to do things we don't like to do and we have to get along with our fellow workers. Is there something that has happened to this person as a result of the accident and injury that this individual cannot rationalize and accept and understand that fact and do anything about it? [emphasis ours]

A. That appears to be the case, yes." (TR 551-553)

The testimony of Dr. Terry William Taylor, the only defense witness, a psychiatrist, revealed the following: he examined the plaintiff and had available the uncontradicted evidence in the form of affidavits produced at trial furnished by the plaintiff (TR 563). In addition, the physician took into consideration the psychiatric testing performed under the witness's supervision.

In addition the plaintiff presented to the defense witness the medical records introduced into this trial into evidence (TR 562). In addition the witness was furnished a form of hypothetical question; this likewise being proven in this trial (TR 563). The witness testified substantially as following: that from these records a change in personality was

indicated (TR 563). The injuries of the plaintiff in general terms consisted of severe, gross brain damage from trauma (TR 563). The witness testified the plaintiff suffered severe brain damage at the time of the accident (TR 567). The witness further testified that it is reasonable to say that the plaintiff's present injury is permanent (TR 567). The doctor testified that he is aware that the reticular formation of the brain is related to keeping the brain awake (TR 568). He believed that as a result of this accident this patient had a personality change consistent with brain damage (TR 568). The doctor further testified that the plaintiff's injury would affect his relationship with other people. The doctor then testified that in his opinion the plaintiff would be employable and that he could be employed gainfully. He believes there is a chance that the personality would improve, however, the doctor specifically states that with regard to the possibility that the entire situation, organic brain damage and all the rest of it, could improve or get worse, he stated, "that I really can't say" (TR 574). His testimony in this regard is quoted:

"A. Yes sir, this is the difficulty. If you are referring strictly now to the personality aspect I would think he would improve, but if you are asking me is there any possibility that the organic brain damage may change, I don't really think I can answer that.

Q. Do you have an opinion based on the examination of the plaintiff and the affidavits and so forth, and your experience, to a reasonable medical certainty as to whether or not the plaintiff would benefit by therapeutic or some kind of therapy measures to improve his personality condition, the personality change that exists in the plaintiff.

A. Yes, I do.

Q. Would you tell us what your opinion is and on what it is based.

A. My opinion is that he has everything to gain and nothing to lose in attempting to get professional help in learning to deal and live with the damage that he has suffered and to make the best use of those areas that have not been damaged. I base this opinion once again on what I have been taught and what I think is currently being done for all sorts of injuries."

In substance, the witness testified on cross-examination as follows:

A. That there is a neurological basis for all human behavior (TR 577).

B. That if the central nervous system is destroyed, the behavior is destroyed (TR 577).

C. That if areas of the brain are injured and cells destroyed, personality changes result which are permanent (TR 578).

D. If there is evidence of destructive changes, behavioral changes are likewise probably permanent (TR 578).

E. The prognosis in these personality orders is not good (TR 578).

F. Deep-seated personality disorders caused by organic brain damages are more than likely permanent (TR 579). The doctor points out that past employment as related to employment following trauma is a circumstance which would effect an opinion as to future employability (TR 580). Behavior, coordination, and memory are important in determining if disability exists (TR 581).

G. That the following evidential factors are important observations in determining this plaintiff's employability:

1. That the plaintiff makes other people afraid of him (TR 583);

2. That he forgets where he is in time and place (TR 584);

3. That the plaintiff has uncalled-for arguments with customers and employers.

The witness finally testifies that he agrees with the other physicians and that there ought to be something at which this plaintiff is employable, but that he does not know at what it would be.

The uncontradicted evidence shows that this young man, following discharge from the service of the United States, was capable of earning between $4.20 and $5.90 per hour as a mechanic and $4.50 per hour as a beginning truck driver (TR 353); that within nine months preceding his accident, he was able to earn more than $5,000. His life expectancy was 50 years. There was no reason to believe that he would not have opportunities for advancement.

Pre-Traumatic History Summarized

A summary of the pre-traumatic history of Oren Bell would show that as a boy, Oren Bell was able to do the work of a man.

1. He did manual work (TR 231).
2. He ran a fork lift (TR 231).
3. He was in good physical condition, coordination and mental capacity (TR 232).
4. He was responsible (TR 232).
5. He was trustworthy (TR 232).
6. He worked without supervision (TR 232).
7. He was happy and carefree just like other boys in the neighborhood (TR 237).
8. He was known by those who had known him all his life to be efficient (TR 250).
9. He got along well with customers at the filling station where he worked (TR 250).
10. He was normal for a boy of his age (TR 250-251).

11. Other mechanics felt he was fast and courteous and normal in his work as an attendant (TR 260).
12. He serviced a car properly (TR 260).
13. He was polite and considerate (TR 261).
14. He was cheerful (TR 262).
15. An employer who knew him all his life and for whom he worked approximately three years before his injury employed him to do mechanical work and general work on the service station, waiting upon the general public. He changed tires, made minor electrical repairs, tuned up engines, including carburetors, distributors, and generators, and he "got very competent." He raced cars and tuned up engines for other boys (TR 269-270).
16. Another witness who regularly saw the plaintiff on the job, who saw his work every week in the year before the accident, described him as being a good service station attendant and who had been observed to do good work for other people (TR 281).
17. He was described as observant in what a car should need and things like that (TR 282).
18. He was described as a good, typical boy. He took flying lessons. He was always putting carburetors on his car and "doing things and him and his friends was always going all the time," (TR 290).
19. Mrs. Florette Parker, a mother of 13 children with whose boys the plaintiff had grown up, described him as "a typical kid" who was

"polite," who would do things that her own children would not do. He had a capacity to love others (TR 339-340).

In addition to the above, other witnesses testified generally as to the normality of the plaintiff's personality and activities prior to the time of his injury. This evidence is in all respects uncontradicted.

Post-Traumatic Condition Summarized

While it is difficult to summarize all of the affidavits on file and all of the oral testimony on file relating to the change in Oren Bell, nevertheless, it appears to be uncontradicted that no employer has seen fit to retain Oren Bell in his employment since the accident. These employers make the following statements about his condition since the accident.

1. He had trouble with his equilibrium (TR 234).
2. He would walk along the scaffolding and fall off and go through the roof (TR 234).
3. He couldn't get out of the way of equipment and sometimes slipped. He might put the fork lift up when it should go down, making him a hazard. (TR. 235).
4. He seemed moody (TR 235).
5. He thought his mother's property was his property and ordered workmen to shut down machinery and stop all operations (TR 236).
6. He was discouraged from coming around the neighbors' house because he got too desperate and was worrying the witness's wife (TR 237).
7. He didn't say things that were quite the truth (TR. 243).

8. He would come to the house and say he was going to shut down all equipment and that night he appeared to forget all about it (TR 243).
9. He would go on a wrecker call and never get there. He would be unable to find his way back to the service station (TR 246).
10. In early morning he seemed more normal but when he got a little tired, he would do things this way. He couldn't remember things (TR 246).
11. He would try to change a tire and when it didn't go on, he would hit the tire and rim with his hand to the extent that he was a compensation claim (TR 247).
12. He is a pleasant fellow. He tries to make you figure he is more intelligent than he is and at other times he is more or less a blank (TR 247).
13. He showed poor judgment in driving a truck (TR 252).
14. He could not work the controls of a truck and the accelerator at the same time. He couldn't do two things at one time. He seemed absent minded. He showed a lack of interest (TR 253).
15. He might do it right once and then the next three times he would miss every time (TR 253).
16. He damaged equipment (TR 254).
17. His physical and mental capacity are insufficient to be a truck driver (TR 254).
18. Following his accident, it is difficult to carry on a conversation with him. His memory was off (TR 271-272).

19. It was said following the accident that he did not recognize his former customers (TR 282).
20. He represented himself to be a full-fledged Texaco man and that Texaco said he could come down to his station and put in a little time and catch up with a little Texaco experience (TR 282).
21. He would put the gas nozzle in the tank all right and then get under the hood and you don't know whether he is checking the oil, battery or fan belt, but he is always fiddling around with something else and it takes as long as ten to fifteen minutes for the car to leave there. I had so many complaints I had to let the boy go (TR 283).
22. He has constant headaches (TR 283).
23. He could not coordinate his mind. "He'd say, for instance, 'well, I got to get me a wrench,' and he'd try to pick it up, with the right arm or the left arm" . . . "but he can't pick that wrench up unless he sits with it and concentrates on it . . ." "He got the rest of the employees pretty well irritated, got the customers so mad, disgusted customers even called me at home personally and would say 'Why don't you get rid of this idiot?' " (TR 284).
24. He is the only one who is doing things right according to himself (TR 285-286).
25. On one occasion after fixing a lady's car and making an appointment for her to come back the

following day, he ran her out of the shop when she came back, declaring that she had no appointment with him (TR 286).

26. It was said by an employer that following the accident he was undependable as to where he might place a jack beneath a car and subjected himself to unsafe conditions. The employer felt sorry for him and the boy wanted to work, but he couldn't have him around (TR 292).
27. He used poor judgment in the use of tools, causing them to break (TR 293).
28. When sent to wash parts, he would wander off (TR 293).
29. He couldn't fix a flat (TR 293).
30. He raised cars on the hoist without looking (TR 293).
31. Within the two years preceding the trial, he is usually by himself instead of with others. Sometimes he talks and sometimes he doesn't (TR 294).

Following this testimony, plaintiff's Exhibits F, G, H, I, J, K, L, M, N, O and S were admitted into evidence. We will not review these affidavits, but we commend them to the Court.

SUMMARY OF ARGUMENT

The Judgment is Contrary to Weight Evidence

In summary of argument concerning damages, the plaintiff's first position is that the clear weight of evidence as a matter of law shows the verdict in favor of Oren Bell inadequate. This clear weight of evidence shows:

A. A pre-traumatic state of affairs in the part of the central nervous system related to emotions, behavior, and functional operation of this boy's person was normal.

1. He grew up in the same neighborhood for 10 years as a normal boy.

2. He completed his military service and was honorably discharged a competent soldier, truck driver, and mechanic.

3. He worked as a tune-up mechanic in the nine months following his military service and preceding his injury earning approximately more than $5,000.

4. His personal relationship with others, ie, employers, his neighbors, and his friends, was a normal relationship.

B. The pathology from which Oren Bell now suffers is that organic brain damage affecting the central nervous system causing:

1. Chronic, persistent, permanent, disabling, post-traumatic headaches.

2. Inability to get along with others in that he is argumentative, nervous, impulsive, and makes others afraid of him.

3. Shows poor judgment and reasoning and memory in that he forgets where he is, becomes frustrated injuring himself, takes chances making him an unsafe employee, is emotionally unstable, loses his way to and from work and does other odd things making him unemployable to the extent that he has been discharged by every employer attempting to employ him.

C. That medical science recognizes that trauma can be the competent producing cause of all of the symptoms and signs and behavioral and emotional disturbances and headaches now suffered and which will in the future be suffered by the plaintiff in this case.

D. That the on-set and progress of the signs and symptoms in this case parallel those cases in which medical science

recognizes the causal relationship between trauma and the disease here suffered and that in all probability the emotional disturbances, diseases, disabilities, headaches, and other functional problems now suffered by this plaintiff will be permanent.

E. That the disabilities here suffered and to be in the future suffered are so disabling that, according to the uncontradicted opinions of all the physicians, there is now no known employment in which this plaintiff, to a reasonable medical probability, may in the future be able to be engaged.

F. The appellate court should review this case de novo and enter findings consistent with the uncontradicted evidence for it is respectfully urged that it would be useless to again refer this case to the trial judge with a request that the appellate court be advised by the trial court as to how and why it, the trial court, was wrong and in error.

ARGUMENT

The judgment of the court finding damages in favor of the plaintiff, Oren Bell, in the sum of $139,113.65 and against the defendant, United States of America, is erroneous and contrary to law and to the evidence upon the grounds that the same is inadequate.

The right to recover full and complete damages at law is a favored right because it arises out of an absolute right to security of mind and body and is assessed in correction of an absolute wrong.

It is only through recognition and understanding of the law and the judicial process that we may arrive at a correct determination of this given case. There are at least two conflicting interests in every case. The decision must either decide in favor of one of the interests or decide in compromise. There is no other way. In seeking to find the answer in this case we endeavor by this brief to advocate the

full, complete protection of the interests of personal security in health and life and limb. This interest is entitled to be secured to its fullest extent and not in compromise as against the securing or compromise in law of the interest of the wrong-doer.

The first duty of law therefor is to protect this first, most favored right; to consider this case with a view to placing this plaintiff by assessment of damages in the position he would have enjoyed had not this wrong been committed upon his body; to provide appellant with security to replace the means of subsistence of which he has been deprived through no fault of his own.

POPE JOHN XXIII (Encyclical Letter, Pacem in Terris, Peace on Earth - Order Among Men, p. 5):

> "Beginning our discussion of the rights of man, we see that every man has the right to life, to bodily integrity, and to the means which are necessary and suitable for the proper development of life. These means are primarily food, clothing, shelter, rest, medical care, and finally the necessary social services. Therefore, a human being also has the right to security in cases of sickness, inability to work, widowhood, old age, unemployment, or in any other case in which he is deprived of the means of subsistence through no fault of his own."

There is no more ambiguous word in the legal and juristic literature than the word "right." "In its more general sense it means a reasonable expectation involved in civilized life." Roscoe Pound, Jurisprudence, Vol. 4, Sec. 118, p. 56. ". . . or (b) it may mean the interest recognized, delimited with respect to other interests, and secured." Roscoe Pound, Jurisprudence, supra.

"In maturity of law, the legal system seeks to secure individuals in the advantages given them by nature or by their

station in the world and to enable them to use these advantages as freely as is compatible with a like free exercise of their faculties and use of their advantages by others." Roscoe Pound, Jurisprudence, Vol. 1, Sec. 24, p. 430-1. "Juristically the change began with the recognition of interests as the ultimate idea behind rights. It began when jurists saw the so-called natural rights are something quite distinct in character from legal rights; that they are claims which men in civilized society may reasonably make, whereas legal rights are means which a politically organized society employs in order to give effect to such claims within certain defined limits. But when natural rights are put in this form, it becomes evident that these individual interests are at most on no higher plane than social interest and indeed, for the most part, get their significance for jurisprudence from a social advantage in giving effect to them." Roscoe Pound, Jurisprudence, supra.

The enforcement of these rights . . . "grows out of the need of equality of operation, predictability, and assured certainty of results under known situations of fact which men feel strongly to be intrinsic in a just order of relations and of conduct. Probably the jurist can do no more than recognize the problem and perceive that it is put to him as a practical one of securing the whole scheme of social interests so far as he may." Roscoe Pound, Jurisprudence, Vol. 3, Sec. 100, pp. 330-331.

"The rights of persons, we may remember, were distributed into absolute and relative: absolute, which were such as appertained and belonged to private men, considered merely as individuals, or single persons: . . . And the absolute rights of each individual were defined to be the right of

personal security, the right of personal liberty, and the right of private property, so that the wrongs or injuries affecting them must consequently be of a corresponding nature.

1. "As to injuries which affect the personal security of individuals, they are either injuries against their lives, their limbs, their bodies, their health or their reputations."

Cooley's Blackstone, 3 ed. rev., Vol. 2, p. 118, Chicago, Callaghan & Company, 1884. In defining the right of the individual to personal security and his life and limb and body and health, we thus define the wrong or injuries which affect them as absolute wrong. At this time we first pose the question, does the doer of this absolute wrong occupy a place in society or hold an interest which society holds entitled to security.

Thus, it was necessary that a system of law (legal rights) be established to preserve the absolute natural right and interest of the individual to his health, life and limb. We secure these rights in various ways. First, by determining whose interests are to be recognized and secured; and secondly, by the means of redressing an invasion of this security or interest. It goes without saying that redress for the invasion of the interest and security of good health, life and limb where invasion of that right has taken place through negligence is through the establishment, maintenance and preservation of the legal right to recover damages. Roscoe Pound, Jurisprudence, Vol. 3, Chapt. 15, Sec. 191, p. 334, et seq. (See also Cooley's Blackstone, 3 ed., rev. Vol. 2, pp. 118-120-121) The interest of the wrong-doer is only protected in that the law shields him from assault by the injured or his clan.

Thus, it is the duty of the trial courts to decide cases involving injuries to the persons arising out of negligence in a judicial way for "a court is defined to be a place where justice is judicially administered." Cooley's Blackstone, 3 ed., Vol. 2, p. 23. By this is meant that the court must take that which is before him and, after weighing that which is before him, render judgment. This judgment must be consistent with the evidence and must give effect to the legal rights securing the interest protected by law.

"Inviolability of the physical person is universally put first among the demands made by the individual." Roscoe Pound, Jurisprudence, Vol. 3, Chapt. 14, p. 33.

It is fundamental that having recognized the individual's interest in security of health, life and limb, and having recognized that legal rights to secure that interest must be established, we must necessarily proceed to give a judgment which is not violate of the nature and purposes of that right and interest. For, in plain words: To take a life and give a dollar, to take a limb and give a dime, only pays lip service to the right; degrades the right; makes the right useless; and secures to the wrong-doer a benefit to which he is not entitled under law in our social order.

The right is secured because man's dignity may only be obtained through the use of his mind and body in good health. To invade a healthy mind and body invades the dignity of man. To pay lip service to his right to dignity and to his healthy mind and body through incomplete award invades the right and degrades the right and is degrading to our civilized social order.

We must recognize that judges are men and that their judgments are the result of their knowledge and understanding

and experience. Or, if not that, that their judgments come from learning and understanding and stand as evidence of willingness to give effect to that learning, recognition and understanding in their decisions.

We know that it is always the wrong-doer who cries the loudest. He announces that giving effect to natural rights will put endless work on judges; will raise the taxes of individual men; will increase litigation; and will cause society to become a jungle. While remaining in utmost good health he brands the claimant as a charlatan and a chiseler. He waits in high places with blandishments to prevail upon the judge. Of integrity he has none because he seeks to justify wrong-doing. He seeks to prevail upon the law that it is more important that the innocent shall suffer for the invasion of his peace of mind and body and dignity than it is to assess damages against him the wrong-doer. Although his horn is of tin, it makes much noise.

He condemns the assessment of a large judgment because it is large. Yet law requires a large judgment to compensate a large loss.

Little does the defendant "appear" to value the legal protection afforded him by the payment of money damages. For were it not that society has chosen, in order to avoid civil violence, that he may pay damages to the plaintiff to recompense the wrong, then society must allow the plaintiff an equal assault upon the defendant's body. The wrongdoer would not choose the Hammurabic law of "An eye for an eye". Rather, I suspect the defendant would pay ten times and still enjoy his good bargain. Oleck, Damages to Persons and Property, Chapt. 1, Sec. 2, p. 2, Central Book Company, Inc., 1961.

But if we shall continue to protect the innocent, and secure the right of health, then judgment must recompense the injury, and place the innocent in the same position as he would have been without the wrong; (Oleck, Damages to Persons and Property, Chapt. 1, Sec. 1, p. 1, Central Book Company, Inc., 1961) (Wilscam v. U. S., 76 F. Supp. 581) we must cast aside contentions and false premises which do violence to the preservation of individual dignity.

That the physical person is universally considered inviolable is not a phrase composed of empty words. It is not an empty theory. Under this postulate the law has stood firm for centuries. These words promise to every person that he shall share in the dignity of man. His dignity is not found in a man's power or his possessions. It rests on his right to be treated as a man equal in "opportunity" to all others. It says that he shall share in equal opportunity, educate his family, provide for his own welfare with a healthy body, uninjured through the wrongdoing of another. To deny him compensation is to deny his hopes and his dignity. To apply any other test is to deny him the right to dignity.

In non-jury cases upon appeal to increase the judgment the case should be heard de novo. 1/ We recognize that the appellate court has the power in negligence cases to increase inadequate verdicts in a case where the trial judge sits without a jury.

Under these provisions of law the appellant then requests that the Appellate Court consider this case de novo and enter findings and reform the judgment in this case according to the evidence as it will be hereafter discussed.

1/ Baum v. Murray, 162 P.2d 801 (Wash. 1945); United States v. Compania Cubana de Aviacion, S.A., 224 F.2d 811 (1955 C.A. 5th, Fla.); Croan v. Banner Ohio Transfer Co., 65 N.E. 2d 910 (1943 App.)

There are several reasons why the method of additur and reformation of the judgment should be adopted by the court in this case, the least of which it has been almost three years from the time of plaintiff's injury to the writing of this brief. None of this fault can be laid to the plaintiff's door. Moreso, because the evidence is devoid of any genuine controversy as to the plaintiff's physical condition or his disabilities and inabilities to perform normal pursuits. As the court will see, we do not contest the facts found by the trial judge insofar as they were found. Our objection is that the trial judge failed to enter adequate findings in some regards, later to be discussed, which do not do justice to the state of the evidence.

At the outset we find that the defendant, United States produced but one witness, Dr. Taylor. That witness received no background evidence from the government. The factual basis upon which he made his decision was furnished by the plaintiff. He was not asked and he did not find at what type of employment the plaintiff might be able to work. He recognized that he did not know at what type of work this might be. He recognized as did all of the other physicians who testified in the case that this boy, while attempting to work, had been discharged by every employer. He recognized and did not dispute that the boy was impulsive, argumentative, strange, forgetful, and suffered pain. He accepted as being consistent with the condition found by him and the organic injury diagnosed by him the testimony of all the witnesses in this case whose evidence appears in the affidavits and transcript here.

It has often been said that damages in personal injury cases are necessarily speculative. This is not true in a case involving organic injury to the brain. Although it is recognized that there is some room for improvement over a

period of time immediately following an injury, that is, two years, it is generally accepted by medical science and all of the doctors here, as indicated in the Statement of Facts, that organic injury to the brain is permanent. Brain cells do not re-generate and that personality changes which can result are permanent (Taylor, TR 578). The prognosis is not good (TR 578-579). It is important in forming an opinion as to future employability that the boy is unable to hold a job (TR 580). Such is important in determining disability (TR 581). This boy's injury was so severe that even a history would not have been necessary to clinically determine that Oren Bell would have difficulty. The factors which have been testified to by all of the witnesses are considered by Dr. Taylor in making his opinion. He concludes that he does not know at what this boy might be employable (TR 585).

This then is the extent of the defense evidence. This is the extent of dispute over Oren Bell's employability. This is the extent to which he will be able to earn a living in the future as testified to by the defense.

The evidence of plaintiff's physicians, and clinical psychologist, all recognize, based upon his history, that he is permanently and organically damaged. The Court, in asking its own questions, laid to rest any inference that this plaintiff had sufficient understanding to be employed. In inquiring, the Court said, "Is there something that has happened to this person as a result of the accident and injury that this individual cannot rationalize and accept and understand that fact and do anything about it?" The witness answered, "That appears to be the case, yes." This witness saw this boy over a period of nearly three years. The witness was accepted by stipulation as an eminently qualified,

Board-certified, neurosurgeon. No statement of fact nor conclusion of the physician was ever attacked upon cross examination. This young man's headaches are admittedly permanent and will render him incapacitated for the next 50 years. This young man's personality has been destroyed and changed and it will, according to the evidence in this case, render him virtually unemployable for the next 50 years. His left hand is damaged and will limit his employability for the next 50 years. His life has changed in that he is lonesome, he no longer has many friends, his former friends are afraid of him, they feel he may become desperate. This condition will exist for the next 50 years, rendering him an unhappy, lonesome person. We again point out that this evidence is undisputed.

It has often been pointed out every verdict must be consistent with the evidence. The opinion of experts must be supported by facts. The witness must not speculate. The verdict should not rest upon passion and prejudice. The assessment of damages for each element of injury should address itself to the evidence and be consistent with the evidence and should, of course, take account of the severity of the injury, the length of time which it will be suffered, and the effect which it will have upon the individual.

Had Oren Bell recovered in one year, counsel for the government would have contended that damage to his arm must therefore be limited to one year and he would have asked the Court to assess an amount of damage consistent with that injury. If we should have assumed in this case, as evidence confirms, that the plaintiff was capable of earning $9,000 in one year and his injury lasted for one year, then he could not recover except $9,000.

If the injury had been painful for one year and the pain should have been severe for one month, moderate for three months, and slight for six months, then damages for 30 days of severe pain should be assessed, damages for three months of moderate pain should be assessed, and damages for six months of slight pain be assessed. The government would contend, therefore, that no more could be assessed. Had Oren Bell suffered a personality change for one year, suffering lonesomeness, loss of friends, impulsiveness, aggressiveness, argumentativeness, and was guilty of making false statements to others causing him to be disliked for one year, then, of course, a value must be set upon this damage for a period of one year and no more could be set and the government would have contended that the application of any other rule would be unjust and contrary to law. And, the government would have been correct under that set of facts.

Had Oren Bell suffered medical damages and hospital bills in an amount of $1,000, the government would have correctly contended that no more could be assessed. Had the government contended that this young man would not be able to pursue his former employment after one year, it would, of course, have been improper to assess damages for any loss of capacity to earn money in the future. Likewise, the government would have been correct in this argument.

BUT SUCH IS NOT THE CASE HERE AND THIS CASE MUST BE BASED UPON THE CASE HERE.

The mental injury or Oren Bell is a permanent injury. It is one which will eventually accompany him to his grave (Carminati v. Philadelphia Transportation Co., 176 At. 2d 440 [Supreme Court of Pennsylvania, January 2, 1962]). The

mental suffering in this case will not be suffered in a blinding flash but in a gray succession of days, months, years and lifetime. The joy of a normal life has been taken away for the next 50 years, more than 18,250 days.

Can anyone believe that the judge was correct when he recognized a destroyed normal life for 18,000 days and that this value was $119,000.00--about $6.00 per day. Premorbidly he earned $22.00 per day at 19 years of age.

Now this plaintiff suffers severe persistent, chronic, permanent, daily headaches which likewise will go with him to his grave. It is not the evidence here that he will be well in one year. The evidence here is he will be free of these headaches when he dies. Oren Bell would ask the appellate court to contemplate this idea of damages for just a moment and review the findings of the trial court in the light of the lifetime of Oren Bell, 18,000 days. We cannot believe that any person should be required to be compensated for a daily headache at the rate of 50 cents per day. Oren Bell would not agree that 50 cents per hour was reasonable for this suffering.

We do not know upon what basis the trial court could have found the value of this chronic, persistent headache, in earning capacity, but we do know that based upon the known facts here, such a verdict is inconsistent with law and reason for whatever reason in fact it was based upon. The trial court had no right, of course, to disregard the uncontradicted evidence.

Likewise, it is not the evidence here that Oren Bell will ever be employable as a mechanic, or truck driver, the way in which he would ordinarily have been expected, under

the evidence in this case, to have occupied his time for the rest of his life. We can see from the evidence that this young man's earning capacity must have been at least and not less than $10,000 per year. However, we respectfully submit that there would be no way in which the trial court could have found this boy's total loss of earning capacity to have been $69,000 in the next 50 years under the uncontradicted evidence of this case. He must be made whole in respect to permanent injury based upon earning capacity and life expectancy (Baldwoski v. U. S., 111 F. Supp. 653).

While due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses (Thesalonia Smith v. U.S.A., C.C.A. 9th 1964, 337 F.2d 237) the findings of the trial court are not conclusive when the entire evidence convinces the reviewing court that a mistake has been committed (Link v. Patrick, 367 P.2d 157), but the court may not disregard the uncontradicted evidence. His decision must not do violence to that evidence, but must instead give to that evidence the effect which reasonable men would expect and not otherwise.

The plaintiff submitted proposed findings of fact in this case (Appendix A). The United States submitted nothing contrary. The court refused to enter findings consistent with plaintiff's findings. The court's findings do not properly reflect the effect of the evidence in this case.

We, therefore, respectfully contend that credibility of witnesses is not involved. That the facts are undisputed. That the United States in no wise offered evidence contrary to the plaintiff's evidence. That the plaintiff's proposed findings are correct; are consistent with the evidence; are

undisputed; and that the Appellate Court should enter findings consistent with the findings of fact proposed by the plaintiff.

Plaintiff further contends that it would be useless to re-submit such findings to the trial court for comment since the trial court has already refused to comment on the plaintiff's findings. The plaintiff contends that it would be unfair to submit the case for a new trial since the government has already had one full fair trial and an invitation should not be issued to the government to try again to do a little better.

There is no necessity for additional findings in this case as were required in Hatahley v. U.S., 351 U.S. 173, 182, 100 Lawyers Edition 1065, 1074 (1956). The trial court entered particular findings as to particular items of damage much the same as was done in Imperial Oil, Ltd. v. Drlik, 234 F.2d 4, 10 (6th Cir.), cert. denied, 352 U.S. 941, 1 L.ed 2d 236 (1956) and we recognize that damages specifically granted for pain and suffering likewise lie in the sound discretion of the trial court.

However, where the pain and suffering, and the mental suffering, in addition to destroying normal life, have the additional effect of making the plaintiff unemployable, then this unemployability becomes a matter of pure mathematical calculation. It is of no use to return this case to the trial court. The learned judge there could only tell us why he was wrong or how he did not arrive at an adequate judgment in this case.

The plaintiff's memorandum on damages clearly set forth the law of this state and the law of the U. S. in attempting to assist the court in performance of this law

(Descha v. U. S., 186 F.2d 623 [7 C.C.A. 1951]). The appellate court, having the same findings before it, may review the validity of these findings.

Where the evidence is uncontradicted and where the credibility of witnesses is not involved and where the trial court has already failed and refused to make a proper evaluation of plaintiff's damages then the plaintiff contends that he has an absolute right to a new and final determination by an Appellate Court. The plaintiff does not have to prove his case beyond a reasonable doubt but only by the greater weight of evidence. In this case he did prove his case beyond a reasonable doubt. He also proved beyond a reasonable doubt that there is no known work at which he may be employed for the rest of his life. The best that anyone was able to do in behalf of the defense was to speculate that there ought to be something at which he could be employed, but that it is unknown what it might be.

We, therefore, respectfully submit that the court should take the findings of fact of the plaintiff based upon the uncontradicted evidence and enter those findings in behalf of this plaintiff regardless of the amount of the judgment. (Rogge v. Weaver, 368 P.2d 810) It must be remembered that the trial judge should not attempt to be a guardian of the Treasury of the United States (Indian Towing Co. v. U. S., 76 S.Ct. 122).

There is no evidence to support any findings except total permanent disability.

It has always been the law that the opinion of an expert will be received only so far as it is consistent with the basis for that opinion which appears in the evidence.

We recognize that Dr. Taylor would say that he felt Mr. Bell was employable; however, this opinion is not supported by the basis for such an opinion which appear in the evidence of this case. Contrary to his opinion, Dr. Taylor agrees that it is important that a person to be employable must get along with others; Mr. Bell cannot. He must have good coordination; Mr. Bell does not. He should not be argumentative with customers or his employer; Mr. Bell is. That he has been consistently discharged for incompetence; Mr. Bell has. That work history is an important criteria, and is perhaps one of the major factors, in determining whether or not he can adjust to a normal society and is disabled; Mr. Bell is so disabled by headaches. An important observation is whether his history shows a change; Mr. Bell's has. That even without history, Mr. Bell will apparently have difficulty. That the individual makes others afraid of him; Mr. Bell does. That one forgets where he is in time or place or location; Mr. Bell does.

There is, then, no evidence to show in what way this young man might be able at some speculative unknown time in the future be able to make a living.

CONCLUSION

It is then respectfully urged that the appellate court review this case de novo for it is in the same position based upon the uncontradicted evidence that would have appeared had the trial court entered adequate findings of fact.

No matter how long the appellate court may consider the evidence in this case, we know that it will reach the

inescapable conclusion that Oren Bell will never again work at those things at which he would have been normally expected to have been employed had he not been injured.

We know that the appellate court will reach the inescapable conclusion that the term of this disability will be 50 years.

We know that the appellate court can just as easily find an annual loss of earning capacity based upon the evidence here as the trial court.

We know that the appellate court will have the same evidence before it as the trial court.

We know that the appellate court can as easily say that there is now no known employment at which this boy could work as easily as the trial court.

We know that the appellate court has the same evidence of permanent loss of coordination, loss of memory, nerve damage in the left arm, argumentativeness, poor judgment, inability to operate a motor vehicle, impulsiveness, etc., as the trial court. We know that both the trial court and the appellate court are in no better position to judge the employability of this young man than are his employers--Howard Thew, David T. McMahn, Donald Beeson, Robert Yost, Joseph Enriquez, Paul Albright, and Sidney Abbott.

We know that the appellate court will find from the uncontradicted evidence of these employers that this young man is not employable for reasons cited by them which would in fact and have in fact constituted the reasons for his discharge.

It would be unlawful to affirm a finding wherein a plaintiff, capable of earning $10,000 per year should, when

totally incapacitated, be granted judgment for loss of earning capacity in the sum of approximately $1400 per year.

We know that the trial court found that between the time of his injury and the date of trial that the trial court assessed lost earnings in the sum of $14,000. This sum is just a little more than one-fifth of the amount of money which the trial court granted this young man for the next unemployable 50 years of his life. Based upon the evidence here this finding is not and cannot be deemed consistent. There is no evidence that this boy is any more employable now than he has been in the past. The uncontradicted evidence is otherwise.

It is, therefore, respectfully requested that the court make independent findings in accordance with the findings of fact submitted by the plaintiff in Appendix A. It is further specifically requested that the appellate court not send this case back to the trial court for further findings rather than to do so appellant requests that the trial court's judgment be affirmed.

It is an age-old concept that there is no yardstick for pain and suffering other than for the fact finder to consider the nature, extent, and duration of the suffering and without passion or prejudice apply that yardstick to the individual case. Pain and suffering is not sold at the "market place."

But, earning capacity is bought and sold at the "market place." The plaintiff has an "absolute right" to

have the money which he will lose in the next 50 years mathematically calculated according to the evidence produced in this case.

Respectfully submitted,

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Attorney for Appellant
Oren Bell

January, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert A. Parrish
Robert A. Parrish

APPENDIX "A"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
ANCHORAGE, ALASKA

OREN BELL, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	NO. A-58-64 Civil FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE having come on regularly for hearing before the above-entitled court, without a jury, on the 9th day of January, 1967, and having been completed and evidence taken January 16, 1967, and the court having taken said cause under advisement, does now make and enter findings of fact and conclusions of law.

FINDINGS OF FACT

I

This action is brought under the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b), 2671 et seq., and that the matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

II

That the plaintiff is a citizen of the United States of America and a resident of Anchorage, Alaska, and is over the age of 21 years.

III

That William Burgess, an employee of the United States Army District Engineers, with headquarters at

Elmendorf Air Force Base, was, at the time of the incident hereinafter alleged, operating a motor vehicle owned by the defendant, United States of America, with the express consent and permission of the defendant, the United States of America.

IV

That on or about January 5, 1964, the plaintiff, then driving a 1962 Plymouth automobile, was proceeding South on the Seward Highway toward his home near the junction of the Seward Highway and Klatt Road. William Burgess was driving a military truck-tractor, pulling a trailer, and was driving said military truck-tractor pulling said trailer in the performance of his duties as an employee of the United States Army Engineers, an agency of the United States of America.

V

That the vehicle of the defendant, United States of America, was caused to be negligently turned to the left, crossing the center line of the said highway and proceeded approximately 15 to 20 feet beyond the edge of said highway, and did then and there, by the negligence of the United States of America, collide with a certain vehicle being operated by the plaintiff, Oren Bell. That said collision occurred without the negligence or carelessness of the plaintiff, Oren Bell.

That as a direct and proximate result of this collision the court finds the following:

1. The plaintiff, Oren Bell, on the 5th day of January, 1964, was of normal health, normal intelligence, and functionally and physically normal. He grew up as a normal

teen-ager with many friends. He liked mechanics and to work on cars. He liked to race automobiles and was a competent driver, although his record shows that he drove too fast at times. He was engaged to marry a girl with whom he grew up in his neighborhood. He enjoyed a good reputation among the older men and women of his community. He served honorably in the service of the United States. Within a period of 9 months immediately preceding January 5, 1964, he earned in excess of the sum of $5,000.00. He got along well with the customers who traded at the service station at which he worked. He was a competent mechanic to the extent that he was trained, and had accomplished both major over-haul and tune-up jobs, although, of course, at his age he was not an experienced mechanic. The work he did was well received and he was well-liked by his employer and by the persons who traded at that place of business. He was ambitious and had evidenced an intention to become a pilot and not to be a grease-monkey all of his life. Although an average student, he had more than average intelligence. His record of employment showed that he worked long hours and was fully attentive and interested in everything he did. He was a part of the neighborhood gang of kids who grew up together and who ice-skated and ran together and did things together. His physical capacity was excellent. The court finds that prior to the 5th day of January, 1964, there is no evidence that the plaintiff suffered any loss of memory, stomach trouble, headaches, deficiency in any of his peripheral nerves, and that he was, according to the evidence, physically normal and healthy in every respect. The above is mentioned to indicate the normal

state of affairs in this young man's body prior to his injury on January 5, 1964, as the same is shown by the uncontradicted evidence.

2. That the plaintiff was caused to be hospitalized at Providence Hospital in Anchorage, and that the reasonable cost of such hospitalization was the sum of $

3. That the plaintiff was caused to spend money to provide doctors' and physicians' services for himself in the reasonable value of the sum of $

4. That the plaintiff was rendered unconscious and remained in an unconscious and semi-conscious condition for a period of more than 14 days; that he was incontinent of bladder and valve; that he evidenced thrashing about in his hospital bed and was required to be restrained; suffered foot drop, and evidenced a posture of decerebration where his limbs were rigid.

From the foregoing facts, in addition to the professional opinions of all of the physicians who testified in this case, both for the plaintiff and for the defendant, the court finds that the plaintiff is suffering from the residuals of a severe and permanent injury to his brain stem and other diffused areas of the brain. The court finds that the plaintiff cannot at all times orient himself in time and space (Thew, Abbott). He has at times become so frustrated in attempting to perform duties of his employment that he has willfully injured himself (Thew). He has not been able at all times to remember persons with whom he was intimately acquainted (Enriquez). He makes rash statements. (Enriquez, Thew, others). He irritates fellow-workers, and cannot remember (McMahon and others).

He is prone to argue with his mployers (Abbott, Enriquez, Thew). He has been discharged on several occasions because he engages in practises dangerous to himself and others, as well as causing damage to his person and property. He performs much of his work in an incompetent manner and with difficulty, and does not seem to be able to understand why he is acting wrongly until after the damage has occurred. He is prone to forget things of which he has been told many times, and wants to do things in his own way. He does not at all times pronounce his words plainly. In conversation he is often known to change the subject to something irrelevant and disconnected with that which is being discussed.

He has never given up a job voluntarily and has been discharged for cause related to the foregoing findings, and because he is dangerous to himself and others, and his inability to get along with fellow-employees and his supervisors.

He is of bright, normal intelligence and menial tasks frustrate him. He wants to do things his way, but exercises bad judgment in doing them and cannot be trusted.

In his dealings with members of the community he is thought to be unpredictable so that it is difficult to tell what he will do next. He makes veiled threats of physical violence which cause others to be uneasy about his true intentions. He is not considered trustworthy for the purpose of baby-sitting with young children, and young children irritate him. Loud noises irritate him, whereas before the accident he freely engaged in all kinds of boisterous activity.

From the foregoing, in addition to much other uncontradicted evidence, the court finds that the plaintiff is, in fact, unemployable.

Based upon the foregoing facts and upon the medical testimony, the court further finds that an actual destruction of brain substance occurred in this plaintiff and that he has suffered a permanent injury to his central nervous system, and particularly the brain stem, and that this injury is the proximate cause of the unemployability of the plaintiff.

The court finds that the injury to the central nervous system of this plaintiff is directly connected with the abnormalities and pathologies from which the plaintiff now suffers, and that these abnormal pathologies were in their onset and progress, directly connected and related to the accident on the 5th day of January, 1964.

The court finds from the medical evidence and all of the other evidence in the case, part of which is heretofore mentioned that the plaintiff has repeatedly attempted to rehabilitate himself in the types of employment with which he was familiar prior to the time of this accident.

The court further finds that because of behavioral difficulties due to his brain stem injury, further training would not make him relatively more employable since he would be unable to get along with people and control his impulses and compulsions and obsessive tendencies, in a normal society.

The court finds that although there is evidence that he might possibly improve, the preponderance of evidence, and especially the medical evidence, is that his condition will remain static for the rest of his life expectancy.

The court finds the life expectancy of the plaintiff to be 50 years.

The court further finds that in addition to the brain injury above mentioned, that as a result of the negligence of the defendant, the plaintiff suffered the following injuries and conditions:

1. The spleen was ruptured and removed.

2. The diaphragm was ruptured and repaired.

3. The plaintiff suffered from a permanent urinary tract condition which will require future treatment.

4. The plaintiff received an injury to the ulnar nerve and now suffers a weakness of the left hand, together with poor coordination of the intrinsic muscles of the left hand, which will likewise cause difficulty in the use of the left hand when engaged in prolonged activities.

5. The plaintiff becomes irritable and nervous; he suffers daily headaches; he has a nervous stomach which may lead to the production of peptic ulcers and which is due to his brain stem injury.

6. The plaintiff suffers poor coordination, dizziness at times, poor memory at times, and has scars which are disfiguring on his arm, stomach and chest.

7. The court finds that the headaches suffered by the plaintiff are of varying severities and are the result of the cranial injury. These headaches become severe at times and as a result of them, the plaintiff may sleep for long periods of time. They extend from each temporal area and across the front of the plaintiff's head. Much medication has been prescribed and used in connection with these headaches. The only effective medication has been found to be a narcotic which is both addicting and has a deleterious effect on the arousal centers of the patient's brain stem which was injured in the accident.

8. The court finds that when compounding together all of these injuries, and particularly the headaches and poor coordination, would render the plaintiff relatively unemployable, even though other injuries heretofore mentioned did not exist.

9. The court finds from the evidence in this case that these facts are uncontradicted and unimpeached, and that the facts above mentioned have been known by the defendant and investigated by the defendant, and that if not investigated, such facts should have been investigated, and must be taken as true.

10. The court further finds that the latter injuries above mentioned are of a permanent nature and are disabling, and were the result of the negligence of the defendant.

11. The court finds that the plaintiff has lost wages, earnings and emoluments, and time, and is damaged in the sum of $

12. The plaintiff has suffered pain and physical disability and is thereby damaged to the date of this trial in the sum of $

13. The plaintiff is unemployable at this time; he will remain unemployable in the future. Assuming a life expectancy of this plaintiff to be approximately 50 years, and assuming that the plaintiff would be capable of working at least 8 hours per day for 50 years, 300 days per year, the court finds that the plaintiff would probably in his lifetime engage in gainful pursuits of one type or another, either in regular employment or in his own behalf, of a value of not less than 130,000 hours at the rate of $6.00 per hour. The court finds that the reasonable value of this

lost time and engagement in gainful pursuits of his own, would represent a total value of $780,000.00.

14. Taking into consideration that substantial devaluation of the dollar will occur during the next 50 years, and that the purchasing power of the dollar will substantially decrease in the next 50 years, the court finds that this award for lost future earnings should not be reduced to its present worth, and the damages of the plaintiff for loss of time and future earnings for the next 50 years is therefore assessed at the sum of $780,000.00.

15. The court further finds that based upon a life expectancy of 50 years, the plaintiff will permanently suffer mental anguish, humiliation and embarrassment.

16. Contrary to the pre-traumatic mental and physical state of the plaintiff, the uncontradicted evidence shows that the plaintiff is now a "loner" and no one really wants him. He no longer is a part of his neighborhood gang or acquaintance. He spends most of his time by himself. Whether this be caused by his inability to get along with other people, or his inability to want to get along with other people or be near them because of his incapacities, the court finds to be immaterial. The plaintiff no longer is able to, or wants to bowl, race cars, go to parties, go out regularly with girl friends; he does not have regular close men friends. He is distrusted by members of his community. He is unpredictable, and assuming that the plaintiff shall probably live under these conditions for approximately 18,250 days, and must suffer this disability day-by-day, the court finds the value of such mental suffering to be $180,250.00.

17. In addition, the uncontradicted evidence shows that this plaintiff suffers daily headaches, and these headaches, according to the medical evidence, are probably permanent and will be suffered for the rest of the plaintiff's life. In addition to the fact that they are disabling, these headaches are painful; these headaches are disturbing; these headaches are the source of fear and anxiety. The court assesses the value of this future physical pain for the next 18,250 days at the sum of $180,250.00.

CONCLUSIONS OF LAW

From the foregoing findings of fact, the court does now enter its conclusions of law:

1. That the plaintiff is entitled to judgment against the defendant.

2. That damages are assessed in the above-entitled cause in the sum of $, together with costs to be assessed by the Clerk of this Court, and plaintiff's attorneys' fees to be paid, and from this award shall be assessed according to the statutes in full force and effect on January 1, 1967, in the sum of 25% of the amount heretofore authorized to be recovered.

DATED AT Anchorage, Alaska, this _____ day of _____, 1967.

_____
United States District Judge